IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-726

COOPER STEVEDORING COMPANY,
Petitioner

v.

FRITZ KOPKE ET AL.,
Respondents

BRIEF FOR PETITIONER

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OPINION BELOW

The district court did not prepare a written opinion. Its findings of fact and conclusions of law were announced from the bench at the conclusion of the trial, and the transcript of those findings is reproduced on pp. 16 of the Appendix and is Exhibit B to the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit, as modified on rehearing, is reported at 479 F.2d 1041. The original opinion of the Court and the modification on rehearing is reproduced on

pp. 18-23 of the Appendix and in Exhibit A to the Petition for Writ of Certiorari.

JURISDICTION

The original opinion of the Court of Appeals was rendered on July 1, 1973. The opinion was modified and rehearing denied in other respects on August 6, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Section 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, amending Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. §905, provides:

> "EXCLUSIVENESS OF REMEDY AND THIRD-PARTY LIABILITY
>
> "Sec. 5(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.
>
> "(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel,

then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."

QUESTIONS PRESENTED

1. Is there a right of contribution in non-collision maritime cases?

2. If there is such a right, should Respondent be allowed to recover contribution in this case against Petitioner?

STATEMENT OF THE CASE

The original plaintiff, Troy Sessions, was injured when he was working as a longshoreman in the Port of Houston aboard the SS KARINA, a vessel owned and operated by respondent, Fritz Kopke, Inc. and under time charter to respondent Alcoa Steamship Company (hereinafter collectively referred to as the "vessel"). Sessions was injured as he walked on top of palletized crates of cargo that had previously been loaded aboard the vessel in Mobile by petitioner Cooper Stevedoring Company. Sessions stepped

into a space between two crates which was concealed by a piece of paper.

The vessel brought an action for indemnity against Sessions' employer, Mid-Gulf Stevedores, Inc., and against Cooper, alleging that the stevedores breached their implied warranties of workmanlike performance owing to the vessel. See *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). No claim for contribution was asserted by the vessel against either stevedore in either the pleadings (A. 4-7) or the Pre-Trial Order (A. 8-17). Sessions did not sue Cooper directly, and neither stevedore brought a cross-action against the other. Shortly before the trial, Mid-Gulf took over the defense of the vessel, agreeing to indemnify the vessel fully. Mid-Gulf was then dismissed, and its attorneys were substituted as attorneys for the vessel.

After a trial to the court sitting without a jury, the district court found that the vessel was unseaworthy, that the vessel and Cooper were negligent, that the vessel was not entitled to obtain indemnity from Cooper because it was guilty of conduct sufficient to preclude indemnity, but that the vessel was entitled to contribution against Cooper for one-half of the damages awarded to Sessions against the vessel. Judgment in favor of Sessions was satisfied by Mid-Gulf, which had agreed to indemnify the vessel.

Cooper appealed, arguing that it was improper for the court to award the vessel contribution. The vessel (through attorneys for Mid-Gulf) cross-appealed, contending that the vessel was entitled to indemnity from Cooper. The Court of Appeals affirmed holding: (1) that the district court's findings of conduct sufficient to preclude indemnity were not clearly erroneous and thus indemnity was properly denied, and (2) that under previous decisions of the Fifth Circuit contribution was properly allowed.

SUMMARY OF ARGUMENT

This is a non-collision admiralty case in which the district court granted contribution. This Court's decisions in *Halcyon Lines, et al.* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952) and *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U.S. 340 (1972) hold that there is no right of contribution in a non-collision admiralty case. The Fifth Circuit in this case and earlier cases has improperly restricted the *Halcyon* rule to cases where the tort-feasor against whom contribution is sought is statutorily immune from direct action by the plaintiff. That distinction cannot be supported by the language and reasoning of either *Halcyon* or *Atlantic*, and thus this case is controlled by *Halcyon* and *Atlantic*.

The *Halcyon* case was properly decided and should not be overruled. *Halcyon* rested upon the considered view that only the Congress could create a right of contribution in non-collision admiralty cases. Because of continued Congressional action in this area, and because of the creation of the right of indemnity, the reasoning of the *Halcyon* case has even more validity now than it did in 1952.

Even if *Halcyon* and *Atlantic* are thought to be inapplicable, or if they are to be overruled, contribution should still not be allowed in this case for a number of reasons: First, the party seeking contribution has already been fully indemnified, and thus its cause of action for contribution has been extinguished. Second, no claim for contribution was asserted by respondent in either the pleadings or in the pre-trial order. Third, under the undisputed facts of the case petitioner did not violate any duty it owed either to the vessel or to the plaintiff. Fourth, any cause of action in a non-collision admiralty case should be limited to an

equitable apportionment of damages between parties who are not subject to the indemnity rules of *Ryan Stevedoring* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

ARGUMENT

I.

AT THIS TIME THERE IS NO RIGHT OF CONTRIBUTION AMONG JOINT TORT-FEASORS IN ADMIRALTY. THIS COURT SHOULD NOT OVERRULE ITS PRIOR DECISIONS SO HOLDING AND CREATE SUCH A RIGHT IN THIS CASE.

In 1952 this Court in a 7-2 decision in *Halcyon Lines, et al.* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, held that there was no right of contribution in a non-collision admiralty case. In 1972 in *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U.S. 340, this Court held:

> "We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third party complaint for contribution against respondent Erie on the authority of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 . . . (1952)." 406 U.S. at 340.

This case is squarely controlled by *Halcyon* and *Atlantic*. Only by overruling *Halcyon* and *Atlantic* may this Court affirm this case. In this section of the Brief, petitioner will demonstrate, first, that adherence to *Halcyon* and *Atlantic* requires affirmance; and, second, that *Halcyon* and *Atlantic* were correctly decided and should not be overruled.

A. *Atlantic and Halcyon control.*

It is undisputed that this a non-collision admiralty case. In granting contribution in the face of *Halcyon* and *Atlantic*, the Court of Appeals for the Fifth Circuit relied upon its decisions prior to *Atlantic* which had held that the *Halcyon*

rule was inapplicable "where the joint tort-feasor against whom contribution is sought is not immune from tort liability by statute." See *Horton & Horton, Inc.* v. *T./S. J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), cert. denied 400 U.S. 993 (1971); *Watz.* v. *Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970).*

The decisions by the Fifth Circuit in *Horton*, *Watz* and now in this case create a right of contribution in non-collision admiralty cases in direct contravention of both the rationale of this Court's decision in *Halcyon* and the precise holdings in *Atlantic* and *Halcyon*. The entire basis of the *Halcyon* decision was that:

> " . . . it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." 342 U.S. at 285.

This Court said in the *Halcyon* case:

> "In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . .
>
> ". . . Congress has already enacted much legislation in the area of maritime personal injuries. . . . Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best

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* The Second Circuit in *In Re Seaboard Shipping*, 449 F.2d 132 (1971), cert. denied 406 U.S. 949 (1972) followed *Horton* and *Watz* in a decision rendered before this Court's decision in *Atlantic*. This Court denied certiorari in *Seaboard* shortly after the *per curiam* decision in *Atlantic*. In *Seaboard*, however, the Second Circuit placed some significance on the fact that an injury to a person covered by the Longshoremen's and Harbor Workers' Act was not involved. 449 F.2d at 138-9.

> bring about a fair accomodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run . . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.
>
> "In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." 342 U.S. at 285-7.

The *per curiam* decision in *Atlantic* was expressly based "on the authority" of *Halcyon,* which can only mean that this Court was reaffirming the rationale of *Halcyon* as well as the holding of the Court on the facts before it. If the reasoning of the *Halcyon* case had sufficient force to form a basis for this Court's opinion in *Atlantic,* that reasoning should have equal force now.

In *Atlantic* this Court was careful to point out that the case was a "non-collision" admiralty case. That statement can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases. In collision cases there has long existed a rule of contribution through the divided damages rule, and this rule long preceded any legislative activity in the area. In non-collision cases before *Halcyon,* at least one Circuit Court had denied contribution* and until *Horton* and *Watz,*

* *American Mutual Insurance Company* v. *Matthews,* 182 F.2d 322 (2nd Cir. 1950).

the *Halcyon* rule was uniformly followed.* Indeed, this Court in *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), recognized a cause of action for breach of an implied warranty of workmanlike performance, thus allowing a cause of action in admiralty cases for indemnity. This cause of action for indemnity has been defined and elaborated in a great volume of litigation since. If this Court in *Atlantic* wanted to leave standing the *Horton-Watz* exception to the *Halcyon* rule, this Court would not have referred to the case as a "non-collision admiralty case" but as a case where the party against whom contribution was sought was statutorily immune to direct action by the plaintiff.

This Court did not say that, however, because the party against whom contribution was sought was not statutorily immune from direct action by the plaintiff. The original plaintiff, Benazet, an employee of Erie, was injured while working on a boxcar owned by Atlantic. At the time of the accident, the boxcar was located on a barge owned by Erie which was moored in the Hudson River in New York Harbor. Benazet sued and recovered against Atlantic on a negligence theory. He did not sue his employer, Erie, since, as the district court noted (315 F.Supp. 357 at 364, footnote 4), he was covered by the Longshoremen's and Harbor Workers' Compensation Act. In *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953), this Court held that a "railroad employee's remedy was under the Harbor-workers' Act exclusively and not under the F.E.L.A." But Benazet's disability from suing Erie for *negligence* does

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* See e.g., *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2d Cir. 1969), cert. denied 395 U.S. 946, *Mendez* v. *States Marine Lines, Inc.*, 421 F.2d 851 (3rd Cir. 1970).

not mean that he could not have sued Erie, as the vessel owner, for *unseaworthiness.* The district court said:

> "Since *O'Rourke,* however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act 'shall be exclusive and in place of all other liability.' See *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expansive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid a 'harsh and incongruous result' leads us to conclude that *this plaintiff would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.*" 315 F.Supp. at 364, ftne 4. (Emphasis added)

Thus, the district court in *Atlantic* assumed that the party against whom contribution was sought was *not* immune by statute from direct suit by the plaintiff. The district court's reading of the effect of *Jackson* v. *Lykes* upon *O'Rourke* is correct and is further supported by *Reed* v. *Steamship Yaka,* 373 U.S. 410 (1963). The *O'Rourke* case was a 5-4 decision, with Justices Warren, Black, Clark and Minton dissenting. The decision was written by Justice Reed, who was one of the dissenters in *Halcyon.* Justice Black's view became the majority, however, and he wrote the decisions in *Jackson* v. *Lykes* and *Reed* v. *Steamship Yaka,* with Justices Stewart and Harlan dissenting. Although *O'Rourke* has never been expressly overruled by this Court, it has not been cited by this Court since *Reed* v. *Steamship Yaka,* and it is obvious that the views of the minority in *O'Rourke* became law in the later decisions.

This Court need not overrule *O'Rourke* in order to reach the result urged by petitioner. By the same token, however, *O'Rourke* need not be expanded in such a way as to undermine the legitimate breadth of *Atlantic*. A fair reading of all of the decisions of this Court culminating in *Atlantic* leads to the inescapable conclusion that the *Atlantic* case means exactly what it says: "There is no right of contribution in noncollision admiralty cases" — irrespective of the right of the plaintiff to bring a direct action against the party against whom contribution is being sought. The Fifth Circuit's attempt to distinguish *Atlantic* on the basis of *Horton* and *Watz*, flies in the face of both the precise holding in *Atlantic* and the underlying rationale of both *Atlantic* and *Halcyon*. Thus the district court, in this non-collision admiralty case, erred in granting contribution.

B. *This Court should not overrule Halcyon and Atlantic and create a new cause of action for contribution in this case.*

This Court's decision in the *Halcyon* case was not based upon blind adherence to the rule against contribution among joint tort-feasors. Instead, it was a carefully reasoned decision based upon sound principles of jurisprudence. As we have already seen, the rationale of the *Halcyon* case was that, considering the pervasive legislative activity in this area of the law:

> ". . . it would be unwise to attempt to fashion new judicial rules of contribution and that the solution to this problem should await congressional action." 342 U.S. at 285.

Since the unanimous decision of this Court in *Atlantic* only two years ago was expressly based "on the authority of *Halcyon*," one can only conclude that this Court recognized only two years ago the continuing vitality of the grounds of the *Halcyon* decision.

Developments since *Atlantic* have, if anything, verified the principle that this area of the law is most appropriately left to the Congress for development.

In 1972 the Congress did adopt substantial changes in the Longshoremen's and Harbor Workers' Compensation Act.* The 1972 Amendments substantially increased the benefits available to injured workers. In return, Section 18(a) of the 1972 Act amended Section 5(a) of the Act (33 U.S.C. § 905) in a manner which significantly lessened the rights of an injured longshoreman to recover damages from the vessel by eliminating the unseaworthiness remedy and further provided that "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." The legislative process which led to the enactment of the 1972 Act, as clearly reflected in its legislative history (see, e.g., House Report No. 92-1441, 3 U.S. Cong. & Adm. News '72, at 4701-4705), involved just the sort of interaction of "many groups of persons with varying interests" spoken of in *Halcyon*, and the Congressional action involved "a fair accommodation of the diverse but related interests of these groups." *Halcyon, supra,* at 286. The Act was a painstakingly worked out compromise between the interests of the injured workers, vessel owners, stevedores and shipyards. Congress can be presumed to have enacted this legislation with full appreciation of this Court's decisions in *Halcyon* and *Atlantic,* and thus this Court and the lower courts should be even more reluctant now to intervene in this area of substantial statutory involvement. *Cf. Flood* v. *Kuhn,* 407 U.S. 258 (1972); *Apex Hosiery* v. *Leader,*

* Even if those amendments had become effective before this accident, the outcome of this case would not have been directly affected by the Act, since the plaintiff recovered against the vessel for negligence, and the vessel's indemnity/contribution claim against the Mobile stevedore was not against an "employer" under the Act.

310 U.S. 469, 487-9 (1940); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15-18 (1941); *Joseph* v. *Carter & Weekes Co.*, 330 U.S. 422, 428 (1947); *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26 (1947).

The 1972 Amendments were enacted against the backdrop of the *Halcyon* rule, which denied contribution, and the *Ryan* rule, which granted a right of indemnity for breach of an implied warranty of workmanlike performance. These twin judicial doctrines saw substantial elaboration and refinement over the twenty years between *Halcyon* on the one hand and *Atlantic* and the '72 Amendments on the other. The *Ryan* principles of implied warranty have been extended by the courts to cover many relationships other than that between vessel and employing stevedore and vessel and employing shipyard. See, e.g. *Dunbar* v. *Henry DuBois' Sons Co.*, 275 F.2d 304 (2nd Cir. 1960); *Whisenant* v. *Brewster-Bartle Offshore Company*, 446 F.2d 394 (5th Cir. 1971). A right of indemnity has been granted for breach of implied warranty even in the absence of privity of contract. See, e.g., *Whisenant* v. *Brewster-Bartle, supra.*

Thus Congress, in its carefully worked out compromise between competing economic forces, has prevented this Court from creating a right of contribution (as well as indemnity) in favor of vessels against the employers of injured workers. Thus the *Halcyon* holding, on the facts before the Court in that case, has been codified by Congress in the 1972 Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act.

What has been left untouched by the Congress in the 1972 Amendments are maritime relationships not governed by those Amendments. Even had the accident giving rise to this case occurred after the effective date of the 1972 Amendments, those Amendments would not have abolished

the vessel's indemnity claim against Cooper because Cooper was not an "employer" under the Act. Any further changes in those relationships should also be left for Congressional action. That teaching of *Halcyon* is more true now than in 1952.

It will no doubt be argued, however, that a rule which disallows contribution among joint tort-feasors is a discredited relic of the past based upon the long-abandoned notion in the tort law that one should not be able to profit from his own wrong. It may be argued that courts are far more free in admiralty to create new law than in other areas. Such arguments may draw superficial support from this Court's decision in *Moragne* v. *States Marine Line, Inc., et al,* 398 U.S. 375 (1970). Upon close examination, such arguments fall far short of compelling rejection of the continuing wisdom of *Halcyon.*

First, it is not altogether clear that the rule against contribution among joint tort-feasors is unjust. Powerful arguments in favor of the rule have been advanced by leading scholars in this area. See James, "Contribution Among Joint Tort-Feasors: A Pragmatic Criticism," 54 *Harv. L. Rev.* 1156 (1941); Note, 68 *Yale L.J.* 1964 (1959). As the Court pointed out in *Halcyon,* "Courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors." 342 U.S. at 285. This has long been the rule in federal courts. *Union Stockyards Co.* v. *Chicago, B. & Q.R.Co.,* 196 U.S. 217 (1905). The arguments over the relative merits of contribution have persuaded the courts in only nine American jurisdictions to allow contribution without legislation and have persuaded the legislatures of only twenty-three states to allow contribution in one form or another by statute.

Prosser, *Law of Torts* (4th Ed. 1971), 306-8. Thus, the states are closely divided on relative merits of a rule which allows contribution.

The situation confronting this Court in *Moragne* was much different. First, the Court in *Moragne* was faced with a common law rule (which did not allow a recovery for wrongful death) which had been rejected unanimously by the state legislatures and by numerous federal statutes. *Moragne, supra,* at 390. Here the Court is faced with a sharp division over the merits of the existing common law rule.

Second, in *Moragne,* the Court overruled *The Harrisburg,* 119 U.S. 199 (1886), an 84-year-old precedent, in contrast to the situation here where the Court is being asked to overrule a case only 22 years old which was expressly reaffirmed only 2 years ago.

Third, one of the underlying principles that led to the Court's decision in *Moragne* was the special solicitude that admiralty courts have for the maritime worker. *Moragne, supra,* at 387. That consideration is either inapplicable here, where the problem is one of allocation between those whose torts have injured maritime workers, or points toward reaffirming the rule against contribution in non-collision cases. As Professor James has pointed out, the rule which allows contribution frequently works against the interests of the injured plaintiff. See *James, supra,* at 1160-1165.

Fourth, in *Moragne,* the Court corrected what had become a lack of uniformity in admiralty law. An underlying theme of admiralty, and one of the reasons for the existence of a separate body of admiralty law, is the desirability for uniform principles to govern maritime activities throughout the United States. *The Harrisburg, supra,*

through *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959), had spawned a development which allowed persons killed by unseaworthiness in state territorial waters to recover in many states [e.g., Texas; see *Vassallo* v. *Nederl-Amerik Stoomv Maats Holland*, 344 S.W. 2d 421 (Tex.S.Ct. 1961)] but not in others such as Florida. *Moragne, supra*, at 395-402. The Court said:

> "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. E.g., *Hess* v. *United States*, 361 U.S. 314 (1960); *Goett* v. *Union Carbide Corp.*, 361 U.S. 340 (1960). Such uniformity not only will further the concepts of both of the 1920 Acts, but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law co-extensive with, and operating uniformly in, the whole country.' *The Lottawanna*, 21 Wall, 558, 575 (1875)." 398 U. S. 401-2.

In contrast, in this case the Court is not faced with a lack of uniformity in admiralty law, except to the extent that recent decisions of the Second and Fifth Circuits conflict with *Halcyon, Atlantic* and decisions in other circuits. In *Moragne* it was necessary to overrule *The Harrisburg* in order to assure uniformity; here uniformity may be assured by reaffirming *Halcyon* and *Atlantic*.

Fifth, the decision in *Moragne* rested in large measure upon the reasoning that judicial recognition of a right of recovery for wrongful death in the general maritime law effectuated Congressional policies reflected in various federal death statutes. *Moragne, supra*, at 393-403. In contrast, as we have already seen, overruling *Halcyon* and *Atlantic* at this point would run counter to the Congressional policy

expressed in the 1972 Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act, enacted as they were against the backdrop of *Halcyon, Ryan* and *Atlantic.*

Finally, the Court must consider, as it did in *Moragne,* whether a compelling showing has been made that prior decisions should be overruled. As the Court said:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors." 398 U.S. at 403.

Here the weighing of all the relevant factors clearly points toward reaffirmance of *Halcyon* and *Atlantic.* Unlike the rule in *The Harrisburg,* the *Halcyon* rule did not rest "on a most dubious foundation when announced, . . ." 398 U.S. at 404. *Halcyon* has not "become an increasingly unjustifiable anomaly as the law of the years has left it behind," nor has it "produced litigation spawning confusion in an area that should be easily susceptible of workable solutions." *Ibid.* Unlike the situation in *Moragne,* the *Halcyon* rule has provided a foundation which has enabled the maritime industry "to predict the legal consequences of [its] actions," and has facilitated "the planning of primary activity," and encouraged "the settlement of disputes without

resort to the courts." 398 U.S. at 403. In *Moragne* the Court correctly pointed out:

> "Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most states. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach." 398 U.S. at 404.

In contrast, the rule denying contribution does provide a clear guide for the planning of activities in the maritime sphere. It must be recognized that in the overwhelming majority of conceivable circumstances under which a right of contribution might be asserted in an accident arising out of maritime activities, the relationship between the putative tort-feasors is consensual. If not actually controlled by express contract, such relationships are frequently controlled by implied agreements, or, in the very least, are potentially susceptible of being governed contractually. The major maritime exception to such a consensual relationship is the ship collision, where, as the *Halcyon* case recognized, there has long been a rule of contribution via the divided damages rule. The law as it presently stands, which allows a right of indemnity for breach of implied warranties of workmanlike performance (except where the relationship between the parties is governed by the United States Longshoremen's and Harbor Workers' Compensation Act) but denies contribution, allows the parties and their underwriters to plan their activities accordingly.

It has long been recognized that perhaps as in no other field of human endeavor maritime risks are covered by various forms of insurance. See Gilmore & Black, *Law of Admiralty*, p. 48 et seq. Such insurance is tailored to existing substantive rules, and parties contract with reference to those rules. Thus many maritime activities are governed by contracts containing elaborate indemnity and insurance

provisions which allocate the various risks and responsibilities among the parties. Bargains made between contracting parties entering into such agreements, and the decisions of parties at times not to enter into such arrangements, has been dictated in no small measure by the underlying rules which are before the Court in this case.

The case at bar provides the Court a striking demonstration of the inadvisability of disregarding the firm precedent of *Halcyon*. Plaintiff, Troy Sessions, an injured longshoreman, sued the vessel on which he was working. He did not sue Petitioner Cooper, although he could have, since Cooper was not his employer. No doubt his counsel felt that the doctrine of unseaworthiness provided a strong case against the ship, and, as a matter of tactics, he did not want to clutter his case by bringing an action for negligence against Cooper. The same tactical considerations have led some commentators to argue that allowance of contribution is disadvantageous to plaintiffs. See, James, *supra*. The vessel then brought an action for indemnity, based upon familiar *Ryan* principles, against both the Houston stevedore which employed the plaintiff and against Cooper. The ship did not bring an action for contribution against either stevedore, and neither stevedore brought cross-actions against the other for contribution. The reasonable expectation of all of the experienced maritime lawyers involved in the litigation was that there was no such right of contribution, and thus no reason to assert any such action. It was not until the district court allowed contribution, that a hopelessly tangled mess was created. Thus it was not the *Halcyon* rule but the action of the district court that "produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Moragne*, at 404. Indeed, not only did Cooper appeal, but so did the vessel on the grounds that the district court should not have denied its indemnity claim. The Fifth

Circuit properly affirmed the district court's denial of indemnity, and under accepted principles the matter should have rested there.

The relationship between the vessel and Cooper was contractual. Their relationship was planned with reference to existing rules which, under some circumstances, might impose liability upon Cooper to indemnify the vessel with respect to accidents occurring in subsequent ports. But Cooper did not plan its activities in contemplation of potential liability for *contribution* with respect to accidents in subsequent ports. Thus, in an industry where risks are almost always insured against, Cooper in this case has no insurance which covers the judgment of contribution obtained against it. Thus the second fear of Professor James in arguing against contribution is realized also in this case, namely that it has been used in an instance "in which an insurance company or a large self-insuror seeks it against an uninsured individual; . . ." James, *supra*, at 1169.

A final consideration against creating in this case a new cause of action in non-collision admiralty cases is the difficulty which will be faced by this Court and the lower courts in coming years in defining the nature of the right of contribution. Contribution statutes take a variety of forms, and it has been pointed out that "the drafting has not been free from difficulty." *Prosser, supra,* at 307-8. In *Moragne* the Court felt that problems in the wrongful death area would not be great because "in most respects the law applied in personal injury cases will answer all questions that arise in death cases." *Moragne* at 406. As the Court pointed out, future litigation could be guided by the generally consistent provisions of existing federal statutes allowing wrongful death recoveries. Even with such guidance, however, the Court has recently been sharply divided on the measure of damages in such actions. See, *Sea-Land Services, Inc.* v. *Gaudet,* 42 L.W. 4168 (January 21, 1974).

With respect to contribution, however, courts will be provided with significantly less guidance than in the wrongful death area. Existing doctrines of maritime law point to inconsistent conclusions, since in collision cases divided damages applies but in personal injury cases comparative negligence applies. Thus, is the right of contribution to be 50%, or is it to be equitably apportioned according to fault?

Other problems also exist. What statute of limitations controls and when does it begin to run? How are the rights to be determined when one tort-feasor settles with the injured person? What effect shall be given to the tort-feasor with an individual defense or immunity, whether by decisional law or statute, with respect to actions by the plaintiff? How will such a rule of contribution be coordinated and reconciled with existing doctrines of indemnity? With respect to the latter question, for instance, what rule controls when both tort-feasors are negligent but one has breached a warranty of workmanlike performance to the other which would normally give it a right to indemnity? Or, what happens in the situation where A and B are jointly negligent tort-feasors, and B has breached a warranty of workmanlike performance, but A has been guilty of conduct which under existing doctrines would preclude indemnity? See, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958); and compare *Waterman S.S. Corp.* v. *David*, 353 F.2d 660 (5th Cir. 1965) cert. denied, 384 U.S. 972, with *Southern Stevedoring & Contracting Co.* v. *Hellenic Lines Ltd.*, 388 F.2d 267 (5th Cir. 1968). Some of the difficulties of fashioning rules of contribution are discussed in *Prosser, supra*, at 308-310, but that discussion does not even deal with the unique difficulties of this problem in the maritime field.

In sum, *Halcyon* and *Atlantic* compel reversal in this case. Those decisions should not be overruled.

II.

IF *HALCYON* AND *ATLANTIC* ARE THOUGHT TO BE INAPPLICABLE, OR IF THEY ARE TO BE OVERRULED, CONTRIBUTION SHOULD STILL NOT BE ALLOWED IN THIS CASE.

Petitioner reluctantly addresses itself to this alternative argument. It is obviously most difficult to argue that one's client should not be held liable under a rule of law which, in substance, does not exist. Normally, a litigant argues that, under some recognized body of law, it is not liable, and issue is joined on how that body of law applies in the case before the court.

One is tempted to follow one of two courses of action. First, this whole section of the brief could be omitted on the firm conviction that *Halcyon* and *Atlantic* clearly control and should not be overruled. Indeed, one is a bit timid about writing a brief on the assumption that this Court may overrule or render meaningless a decision only two years old. Second, one is tempted to dismiss the whole problem by asking the Court, in the event that *Halcyon* and *Atlantic* are either found to be inapplicable or to be overruled, simply to reverse and remand the case to the district court to consider afresh the case as a contribution case, giving the parties the right to develop both the facts and the law further. Such an approach is most tempting in this case because no one conceived of the case as one for contribution until the district court announced its findings from the bench. Neither the district court nor the Court of Appeals really examined whether this was a proper case for contribution.

Thus it is with some reservations that the following arguments are even advanced. Petitioner submits that even if there is a rule which allows contribution among joint

tort-feasors in non-collision admiralty cases, and whatever the outlines are of such a cause of action, this is not a proper case for contribution.

A. Respondent cannot recover contribution against petitioner because respondent has already been fully indemnified; it has not suffered any damages.

After the vessel was sued by the injured longshoreman, it filed third party actions against petitioner, Cooper, and against Mid-Gulf, the Houston stevedore which employed the plaintiff. Immediately prior to trial, Mid-Gulf made an agreement with the vessel agreeing to indemnify it against any recovery which might be made by the plaintiff. (A. 119) Mid-Gulf did not take an assignment of the vessel's claim against Cooper, but instead simply took over the defense of the case brought against the vessel by the plaintiff. Mid-Gulf was dismissed, and its counsel was substituted as counsel for the vessel. Damages that the plaintiff recovered against the vessel were, pursuant to that agreement, satisfied by funds from the liability insurance carrier for Mid-Gulf.

Having been fully indemnified by one stevedore, the vessel no longer has a cause of action either by way of contribution or indemnity to assert against petitioner because there is no way the vessel in its own capacity could have been responsible for any damages by virtue of the plaintiff's claim.

The legal principles involved are fundamental. In tort law where the injured party receives full satisfaction from one of two joint tort-feasors, that releases the other tort-feasor. Prosser, *Law of Torts* (4th Ed. 1971) Secs. 48 and 49. In contract law where two parties are jointly obligated to another, performance by one discharges the other. 4

Corbin, *Contracts,* Secs. 935, 936. Obviously, it would be inequitable for the vessel in its own right to make a double recovery. To prevent a double recovery, the courts of the Fifth Circuit have fashioned a rule under which a plaintiff who settles with one of two defendants liable to him must credit against damages recovered from the second defendant any amount received in settlement from the first defendant. See *Billiot* v. *Sewart Seacraft, Inc.,* 382 F.2d 662 (5th Cir. 1967); *Loffland Bros. Co.* v. *Huckabee,* 373 F.2d 528 (5th Cir. 1967). Applying that principle to this case, since the vessel has received 100% satisfaction from Mid-Gulf, it must give petitioner Cooper 100% credit for any amounts that it would be otherwise obligated to pay the vessel by way of contribution.

B. *The vessel should not be allowed to recover contribution from Cooper because the vessel in its pleadings and its contentions in the pretrial order did not seek contribution.*

The vessel filed a third party complaint against Cooper seeking indemnity, not contribution. (A. 7) The grounds for seeking indemnity as alleged in the complaint was "the failure of Cooper Stevedoring Company, Inc. to perform its *contractual obligations* owed defendant-third party plaintiff, and by reason thereof Cooper Stevedoring Company, Inc. is *liable to indemnify* defendant-third party plaintiff for any damages that it may be required to pay because of the complaint filed herein by plaintiff, . . ." (A. 7) (Emphasis supplied) The vessel prayed only for "judgment over and against third party defendant for *all of its damages,* . . ." (A. 7) In the pretrial order the vessel did contend that both stevedores were negligent and that such negligence "will entitle the [vessel] to recover indemnity from the" stevedores. (A. 9-10) The vessel also

alleged that the stevedores "breached their contractual obligations" and that "such breach entitles the [vessel] to recover full indemnity from the" stevedores. (A. 10) The vessel sought indemnity only, not contribution. Thus the issue of contribution was not before the court, and Cooper was not fully or fairly apprised that any claim of contribution would be made.

C. *Petitioner Cooper did not violate any duty it owed to the vessel, nor was it held liable to the plaintiff; thus, contribution should not be allowed.*

The plaintiff did not sue Cooper (see Pretrial Order and Plaintiff's Second Amended Original Complaint, A. 8-15 and 1-3), although there was no reason why he could not have. The plaintiff's only claim was against the vessel. The plaintiff prevailed upon that claim upon findings of unseaworthiness of the vessel and negligence of the shipowner and charterer. Thus the vessel was a tort-feasor vis-a-vis the plaintiff. But Cooper was not found to be a tort-feasor vis-a-vis the plaintiff, and there is no finding that Cooper breached any duty to the plaintiff. Thus under contribution rules as developed in many jurisdictions contribution should be denied. See *Prosser, supra,* at 307 and cases collected in footnote 61. In *American Mutual Liability Insurance Co.* v. *Matthews,* 182 F.2d 322 (2nd Cir. 1950), the Court said:

> "For a right of contribution to exist between tort-feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. In the case at bar the shipowner and the stevedoring firm were not under a common liability to the injured employee, nor were they joint wrongdoers. His claim against his employer was not for damages, as was his claim against the shipowner, nor was it dependent upon any tort com-

mitted by his employer. Consequently the shipowner can have no right to contribution based on the theory that they were joint tort-feasors."

By the same token, petitioner Cooper did not violate any duty it owed to the ship. An examination of the record is necessary in order to demonstrate this point fully. When the cargo was loaded in Mobile, the undisputed evidence was that the super cargo employed by the vessel gave directions to Cooper concerning how the cargo was to be secured. (A. 152) A representative of Cooper testified that the longshoremen in Mobile attempted to fit the crates as closely together as possible, but that it was not humanly possible to make the tops of the crates absolutely snug against each other and not absolutely possible to prevent some cracks of a few inches between the crates. (A. 148-154) In that connection, the witness testified:

"Q. Now, was your company asked to make any special preparations to cover over this cargo so that it would be fit and ready to have other cargo stowed on top of it and be safe for the men to work on it?

A. No, sir." (A. 154)

• • •

"Q. (By the court) All right. Who determines where and how things are to be stowed?

A. The super cargo for Alcoa Steamship Company, in this case. I mean, it varies in different cases, but this particular one, the super cargo for Alcoa Steamship Company lays the ship out." (A. 155-156)

• • •

"Q. What responsibility, if any, does the ship have?

A. The chief officer, he supervises the stowage of the cargo all the time. He's on the deck looking down to see that everything is going properly.

Q. And he, the chief officer, knows how and where the cargo is stowed?

A. Yes." (A. 156)

• • •

The witness had earlier testified as follows:

"Q. Who decides whether or not a partially filled hatch with cargo shall or shall not be secured? Who makes that decision?

A. In the case of—in this particular case, Alcoa Steamship Company is involved, the super cargo for Alcoa would tell me whether he wants it secured or not.

Q. Who?

A. The super cargo representing Alcoa.

Q. All right. In other words, the shipowner?

A. Mr. Smith [attorney for ship and charterer]:

That's the charterer your Honor.

Q. [By Mr. Brock] The charterer of the ship?

A. That would come through the chief officer and the super cargo for Alcoa.

Q. And the chief mate, is that who you're talking about?

A. Chief mate.

Q. And they are the ones that would tell you whether to secure it or not?

A. That's correct." (A. 152)

This testimony is important because it is the only testimony in the record concerning the relationship between the vessel and Cooper. It leads to only one conclusion, namely, that the vessel determined whether or not to dunnage the cargo and whether or not to secure it. This is significant, in turn, because it relates to some of the stated grounds of negligence and unseaworthiness which formed the basis

of the plaintiff's recovery against the vessel. The district court found:

> "Some types of arrangement should have been conducted to assure that the stow would not, in its trip from Mobile to Houston, move so as to leave spaces between the crates and/or some type of dunnage should have been put on top of the stow, because it was obvious to everyone that in order to get down into the hold to stow other cargo, which it was obvious that other cargo was going to be stowed in that hold, you would have to walk over crates that were stowed there. Consequently, the manner and method in which it was stowed brought about an unsafe place to work and brought about an unseaworthy condition on the part of the KARINA.
>
> "That Cooper Stevedoring Company was responsible for the stowage and that they were negligent in not stowing this cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them . . . . " (A. 163-164)

The court then said, however, that:

> "It is difficult from this evidence for the court to evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other."

Apparently the trial court had forgotten the other evidence on this subject which is quoted above. That evidence shows that as between the vessel and Cooper, with respect to the unseaworthy conditions noted, that it was the duty of the vessel to request Cooper to dunnage off on top of the cargo it stowed; it was the duty of the vessel to request Cooper to do any securing that the ship thought proper; and that at the conclusion of the stowage, the vessel inspected the stowage and advised Cooper that it was satisfactory. (A. 149)

Another factual basis for the finding of unseaworthiness of the ship was the existence of the piece of paper which obscured the crack between the crates. The district court said:

> "The paper itself and the place on which it was, brings about an unsafe condition in that it hid the space through which Mr. Sessions' foot slipped." (A. 165)

But Cooper breached no duty to the vessel with respect to the presence of the paper which rendered the ship unseaworthy, because under the express findings of the court, reiterated on at least three occasions, the court was unable to determine where the paper came from. (A. 165)

Cooper surely cannot be held liable to the vessel for contribution on the basis of speculation and conjecture about the paper, since the only evidence concerning Cooper's relationship to the paper demonstrates that Cooper did not put the paper on board. A witness for Cooper testified that in connection with the loading of the crates there would be no need for separation paper. (A. 149) Further, he testified that when separation paper was used in Mobile, brown Kraft paper was used rather than white paper; he never used any white paper. (A. 150) He further testified that he inspected the stowage upon completion of the job in Mobile, and that he did not notice any white paper in the hold, although "I believe I would have seen it, something as glaring as white paper." (A. 152) The President of Cooper testified that no separation paper was needed for this cargo. If separation paper is required, Alcoa furnishes it. (A. 136) To his knowledge, his company had never used any white paper for separation or for any other purposes. (A. 140)

If Cooper's action were negligent, it may have been potentially liable to the plaintiff, but, because of the relationship between Cooper and the vessel, Cooper should

not be held liable to reimburse the ship for one-half of the liability adjudged against the ship in favor of the plaintiff.

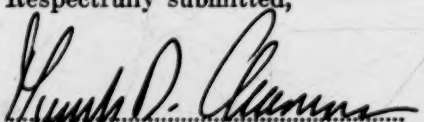
D. *Even if there is a right of contribution in non-collision admiralty cases, it should not be applied to parties whose rights and obligations are determinable under existing indemnity rules.*

Whatever the nature of any new cause of action for contribution in non-collision admiralty cases, the boundaries of that cause of action should exclude attempts to apportion damages between parties who stand in a contractual relationship. The risks between such parties should be allocated in accordance with their contractual understandings and the well-developed law of indemnity following *Ryan*. Application of those rules to this case results in denying indemnity to the vessel because the vessel was guilty of conduct sufficient to preclude indemnity.

CONCLUSION

This Court should reverse the United States Court of Appeals for the Fifth Circuit and render judgment on behalf of petitioner that respondent take nothing from petitioner. Such a result is dictated by *Halcyon* and *Atlantic*, and those decisions should not be overruled. In the alternative, if *Halcyon* and *Atlantic* are inapplicable or are overruled, the Court should still reverse and render in favor of petitioner because respondent is not entitled to contribution from petitioner.

Respectfully submitted,



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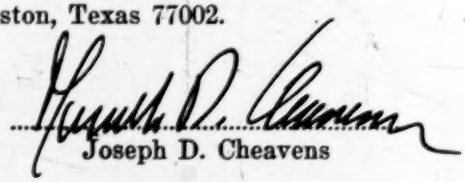
CERTIFICATE OF SERVICE

On this the 21 day of February, 1974, a true and correct copy of the foregoing Brief for Petitioner was personally delivered to counsel for respondents, Messrs. Dixie Smith and H. Lee Lewis, Jr. of Fulbright & Crooker, Bank of the Southwest Building, Houston, Texas 77002.



Joseph D. Cheavens